89-874

Supreme Court, U.S.
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CASE NO. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ILLINOIS CENTRAL GULF RAILROAD COMPANY,

Petitioner,

v.

PHILLIP J. RUSSELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Hobart A. McWhorter, Jr.
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QUESTION PRESENTED FOR REVIEW

Whether a state court, in an action under the Federal Employer's Liability Act, can ignore decisions of the federal appellate courts and allow plaintiff to recover for alleged lost future earnings when no evidence was presented at trial that plaintiff would lose earnings in the future or had suffered any loss in earning capacity?

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Defendant-Petitioner, Illinois Central Gulf Railroad Company, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, certify that the following listed parties have an interest in the outcome of this case:

1. Illinois Central Gulf Railroad Company;

2. IC Industries, Incorporated.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Petitioner, Illinois Central Gulf Railroad Company ("ICG"), respectfully requests that this Court grant this petition for writ of certiorari seeking review of the

judgment of the Supreme Court of Alabama dated June 30, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama has not been released for publication in the official reporter; however, the opinion is reproduced at pp. A-1 to A-14 of the Appendix hereto. No opinion was issued by the trial court, the Circuit Court of Jefferson County, Alabama.

JURISDICTION

The judgment and opinion of the Supreme Court of Alabama was rendered on June 30, 1989. The application for rehearing of ICG was denied on September 1, 1989. *See* p. A-15 of the Appendix hereto. This action was originally brought under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.* This Court has

jurisdiction to review this case on petition for writ of certiorari pursuant to the provisions of 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

This case arises under the Federal Employer's Liability Act, 45 U.S.C. § 51, which reads as follows:

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.

STATEMENT OF THE CASE

This case was commenced on May 20, 1985, against Illinois Central Gulf Railroad Company ("ICG") by Respondent, Phillip J. Russell. The action arose from an injury which Respondent sustained when he slipped on a patch of ice while working for the Illinois Central Gulf Railroad near Bluford, Illinois. Respondent claimed damages under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.*

The case was tried in the Circuit Court of Jefferson County, Alabama. At trial, Respondent testified that since his accident he had returned to work and had worked throughout the fourteen months prior to the trial. He testified that he had worked six to seven days a week as a brakeman and had missed no time from work, although he suffered pain from riding in locomotives. Respondent presented no testimony, expert, medical, or otherwise, indicating that he would miss work in the future on account of his injury, or that he had suffered any loss in earning power. The testimony from plaintiff's treating physicians was that, even though he had a 12% permanent partial disability rating, Respondent could engage in normal work activities without restrictions and that he was not disabled to do any type of work.

Respondent called as a witness an economist who, over ICG's objection, testified hypothetically to the amount necessary to compensate Russell for the loss of

varying percentages of his projected future income, reduced to present value. In closing argument Respondent's counsel, again over objection, argued for an award for loss of future earning capacity in the same percentage (12%) as Respondent's permanent partial medical impairment rating.

The jury returned a verdict in favor of Respondent and against ICG for $325,000, an amount which clearly included substantial compensation for future lost earnings. ICG filed a motion for new trial and for judgment notwithstanding the verdict on May 3, 1988. Those motions were denied by the trial court on May 17, 1988. *See* pp. A-16 to A-22 of the Appendix hereto. In its order denying the motions, the trial court noted that ICG "properly and strenuously raised this question [of the propriety of an award of damages for lost future earnings] and does the same on this motion." *See* p. A-17 of the Appendix hereto.

ICG filed a notice of appeal to the Alabama Supreme Court on June 23, 1988. The Alabama Supreme Court without the assistance of oral argument by counsel affirmed the judgment of the lower court on June 30, 1989. Counsel for ICG filed an application for rehearing in the Alabama Supreme Court on July 14, 1989. That application for rehearing was denied by the court on September 1, 1989.

ICG filed with the Alabama Supreme Court on October 13, 1989, an application to stay execution on judgment. That application was denied by the Alabama Supreme Court on October 25, 1989.

Accordingly, ICG now files this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Decision By The Alabama Supreme Court Is In Direct Conflict With Federal Appellate Court Decisions In That It Permits Recovery of Damages For Lost Future Earnings In An Action Under The Federal Employer's Liability Act When No Evidence Was Presented That The Plaintiff Would Lose Earnings In The Future Or Had Suffered Any Loss In Earning Capacity.

This Court has recognized that standards for proving damages in an FELA case should be uniformly applied by courts throughout the United States. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980). That clearly was the intent of Congress when the Federal Employer's Liability Act was enacted. HR Rep. No. 1386, 60th Cong. 1st Sess, 3 (1908). State courts are required to apply federal substantive law in adjudicating FELA claims, including questions relating to damages and proof of damages. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988). In the present case, the Alabama Supreme Court, in permitting the recovery of damages for

loss of future earnings in this action, has chosen to ignore ample precedent from the United States Courts of Appeals and the appellate courts of several states, and instead has relied on *Carnival Cruise Lines v. Snoddy*, 457 So. 2d 379 (Ala. 1984), an Alabama Supreme Court decision which does not involve the Federal Employer's Liability Act.

A number of decisions from the Federal Courts of Appeals, although cited by ICG in its brief, were ignored by the Alabama Supreme Court. Perhaps the case most closely analogous to the present case is *Parra v. Atchison, Topeka & Santa Fe Railway Co.*, 787 F.2d 507 (10th Cir. 1986). In this recent Tenth Circuit decision, the plaintiff, a trackman performing heavy physical labor, had suffered a slipped disc in his back. The trial court instructed the jury on the issue of future lost earnings. The Tenth Circuit reversed, stating:

> Mr. Parra's back condition and the injury were complicated and not susceptible to observation by the jury. The injuries and their impact on earnings capacity can only be established by expert medical testimony . . . . Where the injury is obscure, as here, a loss of earning capacity must be established by expert medical testimony in order to avoid pure speculation on the part of the jury.

Id. at 509. The court went on to emphasize that "expert medical testimony is necessary to establish that a loss of future earning capacity was caused by such nonobvious injury." *Id.* (emphasis in original). Likewise, in *Dixon v. Pennsylvania Railroad Co.*, 378 F.2d 392 (3d Cir. 1967), the plaintiff was a railroad signalman who suffered a crushing injury to his leg. He returned to work, but testified that he suffered pain while working and was limited in his activities. He also suffered from a permanent condition called fibrositis as a result of his injury, requiring continuing physical therapy and exercise. There was no other testimony indicating plaintiff had lost earning capacity, even though he had not been called on to

climb (one of his regular job duties) since his injury. The trial court on this record instructed the jury that no award could be made for impairment of future earning capacity. The Third Circuit affirmed, noting that there was no medical or other testimony indicating that plaintiff could not perform his job duties. The court held that the burden of proof on this issue lies with the plaintiff and commented that "sheer conjecture cannot be the basis of a jury finding." *Id.* at 392.

In *DeChico v. Metro-North Commuter Railroad*, 758 F.2d 856 (2d Cir. 1985), the plaintiff slipped and fell on a wet ramp, dislocating his kneecap and fracturing his leg. He was able to return to his job and eventually received a salary raise so that he was making more at the time of the trial than he was when the injury occurred. The Court of Appeals for the Second Circuit held that the trial court properly refused to allow the jury to consider impairment of future earnings capacity as an element of

damages in the absence of explicit expert testimony to that effect.

A number of state courts have also rendered decisions which have not allowed a jury in an FELA case to speculate concerning future lost earnings in the absence of expert testimony to that effect. *E.g.*, *Roderick v. St. Louis Southwestern Ry. Co.*, 299 S.W.2d 422 (Mo. 1957); *Honeycutt v. Wabash R.R. Co.*, 313 S.W.2d 214 (Mo. App. 1958).

All of the above cases were cited by counsel for ICG in its brief to the Alabama Supreme Court. None of these cases was acknowledged or mentioned in any way by the Alabama Supreme Court in its opinion. That court relied solely on *Carnival Cruise Lines v. Snoddy*, 457 So.2d 379 (Ala. 1984) (a non-FELA decision of the Alabama Supreme Court) and *Southern Ry. v. Stallings*, 268 Ala. 463, 107 So. 2d 873 (1958) (an FELA case in

which the plaintiff was totally disabled from doing his work), and ignored the ample precedent from other states and the federal courts of appeals that bears directly on the issue in this case.

Unless this Court grants certiorari and reverses the decision of the Alabama Supreme Court, the goal of uniformity in the application of the Federal Employer's Liability Act will be thwarted and railroads who have the misfortune to be sued in Alabama will be subjected to a different standard of proof and different rule with respect to damages for future lost earnings than those railroads who are sued in other states or in the federal courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Supreme Court of Alabama.

Respectfully submitted,

Hobart A. McWhorter, Jr.

Joseph B. Mays, Jr.*

John D. Watson

Counsel for Petitioner,
Illinois Central Gulf
Railroad Company

**Counsel of Record*

OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been served upon all parties required to be served, Frank O. Burge, Jr., Burge & Wettermark, 2300 SouthTrust Tower, Birmingham, Alabama 35203, by forwarding three (3) copies thereof through the United States mail, first-class postage prepaid and properly addressed, on this 30th day of November, 1989.

Joseph B. Mays, Jr.

APPENDIX

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 198-89

Illinois Central Gulf Railroad Company

87-1160 v.

Phillip J. Russell

Appeal from Jefferson Circuit Court

(CV-85-2958)

KENNEDY, JUSTICE.

The defendant, Illinois Central Gulf Railroad Company ("I.C.G."), appeals from a jury verdict in favor of the plaintiff, Phillip J. Russell, that awarded $325,000 in damages, which included damages for loss of future earning capacity. This action was brought under the Federal Employers' Liability Act ("F.E.L.A."), 45 U.S.C. 51 et seq. We affirm.

The issues are whether the trial court erred in submitting the issue of loss of earning capacity to the jury, and whether the trial court erred in allowing Russell's lawyer to argue to the jury the loss of earning capacity in the context of, and in the same proportional amount as, Russell's physical disability rating.

Russell was employed by I.C.G. as a brakeman. In February 1985, Russell injured his back when he slipped and fell on an icy walkway as he was walking from the train to the yard office. Russell was treated at a local hospital and released a few hours later. Over the next six weeks, he received conservative treatment from his family physician for what was thought to be a bruised or strained hip. He was off work for two months. Russell returned to work, but continued to have problems with his lower back. He received treatment periodically from his family physician and an orthopedist. In September 1985, he went on "light duty" and later saw another orthopedic surgeon for a second opinion regarding back surgery. In

October 1985, he underwent surgery for a herniated disk in his lower back, at the L-5 S-1 level. Russell did not return to work as a brakeman until January 1987. The orthopedic surgeon gave him an anatomical disability rating of 12% to the body as a whole. After returning to work, and up to the trial in March 1988, he worked six or seven days a week. He was able to perform his duties as a brakeman, but complained about pain. Russell took non-prescription medicine for pain while on the job and wore a transcutaneous nerve stimulator unit on his back. His regular duties as a brakeman included a significant amount of physical activity. The jolting, bouncing, and vibration incurred while riding the train aggravated his back pain. He had a life expectancy of 31.8 years and a work life expectancy of 18.13 years. Russell earned $41,734.00 in 1987, which was $3,448.00 more than he had earned in 1984, the last full year he worked before the injury. He was still employed full-time by I.C.G. at the time of the trial.

At trial, the jury heard the deposition testimony of Russell's family physician concerning his treatment of Russell's back injury. He treated Russell for pain in his lower back and prescribed pain medication. The family physician's testimony established that Russell had a serious back problem that needed the attention of an orthopedist. He sent Russell to see two orthopedic surgeons, both of whom later recommended that he undergo back surgery for a herniated disk. He allowed Russell to return to work on light duty, which meant he could do no bending or heavy lifting.

The first orthopedic surgeon testified that he examined Russell and found that he had only 30% of normal forward flexibility; very little lateral bending and rotational twist in the lower back; acute tenderness and pain in the lower back; and muscle spasms. He treated Russell conservatively and prescribed pain medication; a muscle relaxant; anti-inflammatory medication; and a lumbar corset. He allowed Russell to return to work, but

told him to avoid lifting and bending. Russell still complained of pain in his lower back and extending down his right leg. Russell had X-rays and a CAT scan, from which the surgeon determined that Russell had a herniated disk, and he recommended that Russell undergo surgery.

Russell went to another orthopedic surgeon for a second opinion.

The jury heard the deposition testimony of the second orthopedic surgeon concerning Russell's back condition. His testimony was that he examined Russell in September 1985 and found that he had 60% of the normal range of motion in the lower back; normal muscle and reflexes; decreased sensation on the top of his left foot; and disk narrowing at the L-5 S-1 level. Russell also had another CAT scan, which showed a herniated disk at the L-5 S-1 level. In October 1985, Russell underwent back surgery. Over the next few months following surgery, the surgeon examined Russell and determined

that his pain was relieved but that he was still having problems, which the surgeon said were consistent with arthritis. Because of the continuing problems with his back, Russell was given another CAT scan and a myelogram; the results showed that he had no other herniated disk. He gave Russell a 12% anatomical disability rating. Several months later, Russell still complained of back problems and had another CAT scan and a myelogram; the results indicated that he had a "prominent bulging of L-4, 5, and again at L-5 S-1, leaning slightly toward the right," and disk narrowing with "some degenerative changes." Three months after Russell went back to work full-time, he fit Russell with another corset and prescribed an arthritis medication. He testified that Russell could engage in normal work activities without any restrictions.

Russell went to see a neurosurgeon for further treatment upon the recommendation of the second orthopedic surgeon.

The neurosurgeon testified that Russell complained to him about back pain. He examined him and stated that, from a neurological standpoint, Russell was not disabled to do any type of work and could do anything he felt capable of doing. He testified that anyone who has been operated on has a tendency and chance to re-rupture another disk, either at the same level or the one above or below. He said that it was also possible that after surgery that a herniated disk might recur with no trauma if the patient has a degenerative condition. He prescribed for Russell special exercises (the "Williams flexion exercise") to build up the muscles in his back to relieve the pain.

Russell testified that he had constant problems performing the duties of a railroad brakeman. He said that he has pain when picking up anything heavy; coupling hoses; setting handbrakes; riding in the train; or sitting or standing for long periods of time. He said that, when he

has the chance, he lies down while at work to relieve the pain.

Russell called an economist as an expert witness. He sated that Russell's net loss of income from February 1985 to January 1987 was $50,397, after taxes and expenses. In calculating the amount of money that Russell will earn in the future (working full-time) he considered the amount of his annualized gross wages; his work life expectancy based on U.S. Department of Labor tables (18.3 years); a 2% real wage gain (the amount of wages exceeding inflation, using the consumer price index); and income taxes paid on future wages. The present value of Russell's future earnings was said to be $716,200; one percent would be $7162; five percent would be $35,810; ten percent would be $71,620.

In closing arguments, Russell's lawyer essentially argued for an award for loss of future earnings in the same percentage (12%) as Russell's anatomical disability rating and asked for $85,944 in damages for loss of future

earnings. He also asked the jury for an award of $344,000 for pain and suffering during Russell's life expectancy of 31.8 years.

The jury returned a verdict in favor of Russell in the amount of $325,000. I.C.G. appealed.

I.C.G. argues that the trial court erred in submitting the issue of loss of earning capacity to the jury in the absence of any direct evidence that Russell's injuries are such as would impair his ability to earn in the future. I.C.G. argues that Russell has worked six or seven days a week for 16 months without missing any time from work due to his injury and that there was no testimony that Russell's ability to earn was impaired.

As we noted at the outset of this opinion, this is an F.E.L.A. case. This Court held in Louisville & N. R. R. v. Steel, 257 Ala. 474, 481, 59 So.2d 664 (1952), that, "Under the Federal Employers' Liability Act the question as to whether the employee's injuries are permanent is generally a question for the jury and the extent of

damages in such an action is peculiarly one of fact for the jury."

In Carnival Cruise Lines, Inc. v. Snoddy, 457 So.2d 379, 383 (Ala. 1984), this Court held that, "Except in extreme and obvious cases, some direct evidence of the existence and extent of impaired earning capacity is necessary as the foundation upon which the jury may make an informed assessment of damages." I.C.G. argues that Russell's case is not extreme and obvious. In Carnival Cruise, this Court went on to say that, "The line between those cases requiring expert testimony to correlate physical impairment with impaired capacity to earn and those falling within the common knowledge and experience of lay persons is a fine one, and must be drawn on a case-by-case basis . . . . Where the fact sought to be proven is fairly and reasonably inferable from competent evidence adduced at trial, and that inference lies within the common knowledge of the fact finder, then that evidence is admissible without the aid of

expert testimony." Id.; see Southern Ry. v. Stallings, 268 Ala. 463, 107 So.2d 873 (1958). We have reviewed the evidence and have determined that the facts sought to be proven are fairly and reasonably inferable from competent evidence adduced at trial and that the inferences lie within the common knowledge of the jury in this case.

This Court held in Southern Ry. v. Stallings, supra, 268 Ala. at 469-70, 107 So.2d at __ (an F.E.L.A. case) that, "Although there is no evidence specifically defining the extent of plaintiff's overall incapacity to engage in gainful work, it nevertheless [is] a question for the jury, in their fair and enlightened discretion, to fix the amount of damages for impairment of earning capacity .... As to impaired earning capacity, like mental and physical pain, mutilation, disfigurement, or loss of an organ, it is shown to be difficult to furnish a standard for measurement, and the amount is to be fixed by the jury in their fair and enlightened discretion." We find the record to be replete with logical inferences that Russell could well lose future

earnings as a result of his back injury. Therefore, we hold that it was not error, in this case, for the trial court to submit the issue of loss of earning capacity to the jury without expert testimony establishing Russell's loss of earning capacity.

I.C.G. argues that it was error for the trial court to allow Russell's lawyer to argue, in his closing argument, that, in essence, Russell's loss of earning capacity was the same amount as Russell's 12% anatomical disability rating. It cannot be clearly shown by I.C.G. that the jury was influenced by this argument, because the jury obviously did not calculate the damages in the same manner that Russell's lawyer suggested in his closing argument. The jury's verdict was for $325,000, which was considerably less than the amount of damages requested in the closing argument ($85,944 for future earnings, plus $344,000 for pain and suffering). This Court said in Southern Ry. v. Stallings, supra, 268 Ala. at 473, 107 So.2d at __ that, "it [is] a matter for the jury, in the first

place, to determine from the evidence the extent of impairment of plaintiff's earning capacity in the future. After making such determination there would then be a basis for the jury to apply such percentage of incapacity to the figures given by the actuary." In this case, an "economist, rather than an "actuary," testified as an expert witness as to the present value of Russell's future earnings ($716,200). Therefore, we hold that it was permissible for the jury to determine from the evidence, in its fair and enlightened discretion, Russell's loss of future earnings, and that it was not error for the trial court to allow Russell's lawyer to suggest, in his closing arguments, that 12% was a reasonable basis for calculating damages.

There was evidence from which the jury could find that Russell was disabled from doing his work as a brakeman. There was evidence from which the jury could assess Russell's damages: the loss of wages from the time of the injury to the date of trial; Russell's pain and suffering resulting from the injury, both past and future;

and impairment of his earning capacity. Southern Ry. v. Stallings, supra, 268 Ala. at 469, 107 So. Sd at __. In this case, the tendencies of the evidence showed that Russell had sustained a permanent injury, and we will not disturb the jury's finding as to Russell's disability and loss of future earnings. The fact that Russell has continued to work six or seven days a week for 16 months is "merely evidence to be considered by the jury in determining whether or not his earning power had been impaired by the accident." Louisville & N. R. R. v. Steel, supra, 257 Ala. at 481, 59 So.2d at 672.

The judgment is affirmed.

AFFIRMED.

Hornsby, C. J., and Jones, Shores, and Houston, JJ., concur.

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OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 87-1160

Illinois Central Gulf Railroad Co.
Appellant
vs.
Phillip J. Russell
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

* * *

XXX Application for rehearing overruled. No opinion written on rehearing. Per Curiam - Hornsby, C. J., Jones, Shores, Houston, and Kennedy, JJ. concur.

* * *

9/1/89
bsa

/s/
Robert G. Esdale, Clerk
Supreme Court of Alabama

CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA

Phillip J. Russell, Plaintiff	]	
vs.	]	CIVIL ACTION NO. CV 85-2958
Illinois Central Gulf Railroad Company, Defendant	]	

ORDER

This case comes on for hearing on defendant's Motion for Judgment Notwithstanding the Verdict and defendant's Motion for New Trial or in the Alternative, for Remittitur. Defendant raises on Motion for Judgment Notwithstanding the Verdict, the sufficiency of the evidence. Although the defendant is not chargeable with the fact of snow and low temperatures there was evidence that defendant knew of the dangerous condition in time to prevent the plaintiff's fall and had means available to accomplish this end. Although defendant presented evidence and strong arguments to the contrary, the

evidence also justified a verdict that the defendant failed to exercise reasonable care under the circumstances at the time and place in question to provide the plaintiff with a reasonably safe place to work.

On Motion for New Trial, defendant argues first the jury was improperly allowed to consider lost future earnings or earning capacity as an element of damages. The defendant properly and strenuously raised this question at trial and does the same on this motion. The Court's reasoning on this issue was set forth in the record at trial, but by way of synopsis the evidence was:

(1) that plaintiff had suffered a serious back injury;

(2) that injury had placed physical restrictions on his activity;

(3) the very activity limited thereby was closely related to and a necessary part of his job;

(4) the partial disability was permanent and would not improve.

Although no vocational expert testified, the medical testimony was quite clear on this point. It is beyond dispute that no witness offered or possible to be offered could say with certainty what amount of future earnings or earning capacity the plaintiff would lose. Even with such testimony, in light of the plaintiff's full-time employment since his return to work, the projection of future events would have been to some degree speculative.

Although loss of future earning capacity does not necessarily follow from a permanent injury alone, here the partial loss of that capacity is fairly and reasonably inferable from the nature and extent of the injury and the

type activities engaged in by plaintiff at his work. The evidence and circumstances here adduced at trial rendered the jury capable, if not just as capable as an expert, to correlate the injury with the lost earning capacity. See Carnival Cruise Lines, Inc. vs. Snoddy, 457 So.2d 379 (Ala. 1984).

Defendant further complains that during voir dire, juror number 201, Mr. Richard Rogers, in response to an appropriate question stated in substance "my grandfather lost a leg working at the Southern Railroad and I could not be fair". Defendant's challenge for cause was granted, its motion for mistrial based on the response was overruled. Mr. Rogers did not say to which side he could not be fair, nor were any words of color used in his response to indicate his bias. Defense counsel was appropriately sensitive as a trial lawyer in a room full of jurors and responded as an advocate. At the time, as well as in retrospect, though, the tone, tenor and circumstances of

the response, as well as the words themselves, appeared neutral to the Court, and not of such a nature as to prejudice either side.

Lastly, defendant asks for a new trial or a remittitur based upon excessiveness of the verdict. It is true that plaintiff argued for a verdict of $344,946.00 and was awarded $325,000.00. Plaintiff's argument included a request for $85,944.00 lost earning capacity. In considering the amount of the verdict, it must be concluded the jury included some amount for future lost earnings or earning capacity. If it was error to submit that issue to the jury, then the verdict should be remitted to $259,000.00 which is computed by subtracting all lost earning capacity from plaintiff's argument. Based upon the evidence in this case and the applicable law as stated herein, however, this Court adheres to its previous ruling that the issue of future lost earnings or earning capacity was properly submitted to the jury.

Is there any other aspect of the verdict amount which requires new trial or remittitur? The trial was conducted energetically and strenuously by counsel, but professionally and fairly within the legal bounds of advocacy. There was little controversy of the kind which unduly injects the personality of the participants into the verdict. The jury was an appropriate mix of ages, races and sexes, and was prompt, diligent and attentive, showing no signs of any motive or inclination to do other than hear the' evidence and reach a just verdict. There were no indicia of any bias, passion, prejudice or undue motive or improper deliberation on the part of the jury whatever. Lastly, there was ample evidence that plaintiff had lost a substantial sum in past wages, had received a serious injury, and had endured and would in the future endure substantial pain.

Without attempting to argue for or against the exact amount of the verdict, or endeavoring to construct a justification for a verdict of exactly $325,000.00, it is this Court's finding that the case was properly submitted to the jury and that, once submitted, the verdict was within the justifiable range of the jury's discretion under the evidence presented.

The Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial or in the Alternative, for Remittitur are therefore due to be and are hereby overruled.

DONE this _____ day of May, 1988.

_____
Arthur J. Hanes, Jr., Circuit Judge

Supreme Court, U.S.
FILED
JAN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

CASE NO. 89-874

IN THE

Supreme Court Of The United States

October Term, 1989

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

v.

PHILLIP J. RUSSELL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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18pp

QUESTION PRESENTED FOR REVIEW

WERE THE TRIAL COURT AND SUPREME COURT OF ALABAMA IN ERROR WHEN BOTH FOUND INFERENCES FROM THE EVIDENCE THAT PLAINTIFF SUSTAINED AN IMPAIRMENT TO HIS FUTURE EARNING CAPACITY TO BE WITHIN THE COMMON KNOWLEDGE OF THE JURY?

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Plaintiff-Respondent, Phillip J. Russell, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, certify that the following listed parties have an interest in the outcome of this case:

1. Phillip J. Russell, Plaintiff-Respondent;
2. Illinois Central Gulf Railroad Company, Defendant-Petitioner;
3. IC Industries, Incorporated.

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CASE NO. 89-874

IN THE

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STATUTORY PROVISIONS

SECTION 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee and, if none, then of such employee's parents; and if none, then the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

The "Statement of the Case" contained in the Railroad's Petition for Certiorari is incomplete, acerb, and opinionated. A proper statement is found in the written opinion of the Supreme Court of Alabama:

> Russell was employed by I.C.G. as a brakeman. In February 1985, Russell injured his back when he slipped and fell on an icy walkway as he was walking from the train to the yard office. Russell was treated at a local hospital and released a few hours later. Over the next six weeks, he received conservative treatment from his family physician for what was thought to be a bruised or strained hip. He was off work for two months. Russell returned to work, but continued to have problems with his lower back. He received treatment periodically from his family

physician and an orthopedist. In September 1985, he went on "light duty" and later saw another orthopedic surgeon for a second opinion regarding back surgery. In October 1985, he underwent surgery for a herniated disk in his lower back, at the L-5, S-1 level. Russell did not return to work as a brakeman until January 1987. The orthopedic surgeon gave him an anatomical disability rating of 12% to the body as a whole. After returning to work, and up to the trial in March 1988, he worked six or seven days a week. He was able to perform his duties as a brakeman, but complained about pain. Russell took non-prescription medicine for pain while on the job and wore a transcutaneous nerve stimulator (TENS) unit on his back. His regular duties as a brakeman included a significant amount of physical activity. The jolting, bouncing, and vibration incurred while riding the train aggravated his back pain. He had a life expectancy of 31.8 years and a work life expectancy of 18.13 years. Russell earned $41,734.00 in 1987, which was $3,448.00 more than he had earned in 1984, the last full year he worked before the injury. He was still employed full-time by I.C.G. at the time of the trial.

At trial, the jury heard the deposition testimony of Russell's family physician concerning his treatment of Russell's back injury. He treated Russell for pain in his lower back and prescribed pain medication. The family physician's testimony established that Russell had a serious back problem that needed the attention of an orthopedist. He sent Russell to see two orthopedic surgeons, both of whom later recommended that he undergo back surgery for a herinated disk. He allowed Russell to return to work on light duty, which meant he could do no bending or heavy lifting.

The first orthopedic surgeon testified that he examined Russell and found that he had only 30% of normal forward flexibility; very little lateral

bending and rotational twist in the lower back; acute tenderness and pain in the lower back; and muscle spasms. He treated Russell conservatively and prescribed pain medication; a muscle relaxant; anti-inflammatory medication; and a lumbar corset. He allowed Russell to return to work, but told him to avoid lifting and bending. Russell still complained of pain in his lower back and extending down his right leg. Russell had X-rays and a CAT scan, from which the surgeon determined that Russell had a herinated disk, and he recommended that Russell undergo surgery.

Russell went to another orthopedic surgeon for a second opinion.

The jury heard the deposition testimony of the second orthopedic surgeon concerning Russell's back condition. His testimony was that he examined Russell in September 1985 and found that he had 60% of the normal range of motion in the lower back; normal muscle and reflexes; decreased sensation on the top of his left foot; and disk narrowing at the L-5, S-1 level. Russell also had another CAT scan, which showed a herinated disk at the L-5, S-1 level. In October 1985, Russell underwent back surgery. Over the next few months following surgery, the surgeon examined Russell and determined that his pain was relieved but that he was still having problems, which the surgeon said were consistent with arthritis. Becasue of the continuing problems with his back, Russell was given another CAT scan and a myelogram; the results showed that he had no other herinated disk. He gave Russell a 12% anatomical disability rating. Several months later, Russell still complained of back problems and had another CAT scan and a myelogram; the results indicated that he had a "prominent bulging of L-4, 5, and again at L-5, S-1, leaning slightly toward the right," and disk narrowing with "some degenerative changes." Three months after Russell

went back to work full-time, he fit Russell with another corset and prescribed an arthritis medication. He testified that Russell could engage in normal work activities without any restrictions.

Russell went to see a neurosurgeon for further treatment upon the recommendation of the second orthopedic surgeon.

The neurosurgeon testified that Russell complained to him about back pain. He examined him and stated that, from a neurological standpoint, Russell was not disabled to do any type of work and could do anything he felt capable of doing. He testified that anyone who has been operated on has a tendency and chance to rerupture another disk, either at the same level or the one above or below. He said that it was also possible that after surgery that a herinated disk might recur with no trauma if the patient has a degenerative condition. He prescribed for Russell special exercises (the "Williams flexion exercise") to build up the muscle in his back to relieve the pain.

Russell testified that he had constant problems performing the duties of a railroad brakeman. He said that he has pain when picking up anything heavy; coupling hoses; setting handbrakes; riding in the train; or sitting or standing for long periods of time. He said that, when he has the chance, he lies down while at work to relieve the pain.

Russell called an economist as an expert witness. He stated that Russell's net loss of income from February 1985 to January 1987 was $50,397, after taxes and expenses. In calculating the amount of money that Russell will earn in the future (working full-time) he considered the amount of his annualized gross wages; his work life expectancy based on U.S. Department of Labor tables (18.3 years); a 2% real wage gain (the amount of wages exceeding inflation, using the consumer price index); and

income taxes paid on future wages. The present value of Russell's future earnings was said to be $716,200; one percent would be $7162; five percent would be $35,810; ten percent would be $71,610.

In closing arguments, Russell's lawyers essentially argued for an award for loss of future earnings in the same percentage (12%) as Russell's anatomical disability rating and asked for $85,944 in damages for loss of future earnings. He also asked the jury for an award of $344,000 for pain and suffering during Russell's life expectancy of 31.8 years.

The jury returned a verdict in favor of Russell in the amount of $325,000. I.C.G. appealed.

Pages A-2 through A-9, Railroad's Petition to this Court.

REASONS FOR DENYING THE WRIT

The law of damages for impairment of future earning capacity in Federal Employers' Liability Act (F.E.L.A.) cases, as well as in other cases, is generally stated in *American Jurisprudence* as follows:

> On the question of impairment of earnings, it is *generally held* that expert medical testimony is not necessary to establish future loss of earning power. Other cases, however, require expert testimony to corroborate claims for loss of future earning capacity.
>
> *Where the injury is obscure,* damages for impairment of capacity to work must be supported by expert medical proof, which must show more than a mere possibility of such damages.

22 Am Jur 2d Section 969, p. 1008. (Emphasis supplied)

As the Supreme Court of Alabama stated in its opinion, the jury's finding an impairment to some degree in Mr. P. J. Russell's future earning capacity was supported not only by his own testimony as to his symptoms, his work-required physical demands and activities, his wearing a TEN's unit

while working, and his wearing a back brace while working, but by the testimony of Mr. Russell's family physician, a neurosurgeon, and two orthopedic surgeons. One of the two orthopedic surgeons operated on his lumbar back and prescribed a change in back braces to relieve pain well after Mr. Russell had returned to work for the railroad. This doctor also continued prescribing pain medication long after Mr. Russell's return to work. These orthopedic surgeons also diagnosed lumbar spine arthritis as a result of Mr. Russell's injury and described post operative tilting of his spine as well as "prominent bulging" of the disc above the level on which surgery was performed. These conditons were described as painful and existing permanently in Mr. Russell's back. The neurosurgeon testified that Mr. Russell had a tendency to rerupture a disc due to his injury and surgery, either at the same level or the level above or below.

In the face of this formidable medical evidence elicited from treating physicians and medical tests, the railroad offered no medical evidence. Nothing! The treating physician opined a 12% permanent anatomical disability to Mr. Russell's body as a whole. His opinion was not challenged by any railroad evidence nor was there any conflicting testimony in the mass of medical proof presented by the plaintiff.

It is clear that the trial jury's award of damages for an impairment of future earning capacity was supported by direct medical evidence of such. In addition, as was pointed out by the Supreme Court of Alabama, the jury had bountiful evidence from which proper inferences of earning impairment could be drawn.

The railroad cites *Parra v. Atchison, Topeka & Santa Fe Railway Co.*, 787 F.2d 507 (10th Cir. 1986), as if *Parra* is in conflict with the opinion of the Supreme Court of Alabama. Both are consistent one with the other, distinguishable in their result only by the weight of the medical evidence in each case. In the case at bar, the medical evidence was sufficient, if not overwhelming, that plaintiff sustained an impaired earning capacity, albeit the jury had evidence of substantial earnings since Mr. Russell returned to work. It

was *L&N v. Steel*, 257 Ala. 474, 57 So.2d 664 (1952), where the Alabama Supreme Court said lost wages and impaired earning capacity were two separate entities:

> Furthermore, the plaintiff is not precluded from recovery for impairment of his earning power by reason of injuries sustained by him because he returned to work in October 1949 and worked up until the time of trial in December 1950. It is held that wages actually earned by a person and his earning power are not identical. The fact that the plaintiff worked for appellant for several months prior to the trial of the case was merely evidence to be considered by the jury in determining whether or not his earning power had been impaired by the accident.

Id., at page 481.

In *Parra*, there was substantial medical evidence; evidence that Mr. Parra was not medically qualified to do the job he was performing *even before his injury and resulting surgery.* He was better off medically after his injury and surgery than he had been before! There was no direct medical evidence in *Parra* of impaired earning capacity. There was no evidence from which a jury could draw any inference of impaired earning capacity. In fact, the evidence was that Mr. Parra was better than ever:

> An examination of the plaintiff's own expert medical testimony here would refute his claim for loss of future earnings. The only expert medical testimony presented by the plaintiff was that of his own physician Dr. O. C. Mitchell. The evidence of Dr. Mitchell's testimony was that Mr. Parra suffered from a congential back disorder which made him more susceptible to lower back injury. Dr. Mitchell's testimony also was that Mr. Parra's unstable back would have disqualified him from work as a heavy laborer had it been detected [before the injury for which he brought suit]. As we earlier stated, expert medical testimony is necessary to establish that a loss

> of future earnings capacity was caused by such a *non-obvious* injury; plaintiff's expert testimony refutes the causal connection between his injury and his diminished capacity for heavy labor. In light of Dr. Mitchell's further opinion after Mr. Parra's back was more stable after surgery than prior to his accident, it seems improper for plaintiff to be compensated for future wages from heavy labor for which his pre-existing congential back disorder had already disqualified him. (Emphasis supplied)

Id. at page 509.

In *DeCluco v. Metro-North Commuter Railroad*, 758 F.2d 856 (2d Cir. 1985), the plaintiff no longer was employed by the railroad in the same capacity as at the time of his injury. He had been promoted to Shop Superintendent, able to exercise his seniority rights as Shop Foreman and Supervisor should he ever be removed as Shop Superintendent.

Dixon v. Pennsylvania Railroad Co., 378 F.2d 392 (10th Cir. 1967), is a bad interpretation of Federal Employers' Liability Act law. When a Court says, as the *Dixon* Court said, that the jury "could not rationally have found it more probable than not that the appellant's climbing ability was substantially impaired" it was referring to a jury that *Bailey v. Central Vermont Railroad*, 319 U.S. 350, 353, 354, 53 S.Ct. 1062, 87 L.Ed. 1444, 1447, 1448 (1942), put in the box in FELA cases. The two cases which have subsequently cited *Dixon* have both reversed trial courts' refusal to allow damages for impaired earning power. One distinguished *Dixon*, *Wagner v. Reading Co.*, 428 F.2d 289, 291 (1970). The other cited *Dixon* in a dissenting opinion on the burden of proof, *Fleming v. American Exporting Lines*, 451 F.2d 1329, 1333 Footnote 1 (1971). However, *Dixon* did allow damages for permanent "disability" but distinguished those damages from any damages for permanent impairment of earning capacity. *Dixon* at page 294.

The defendant's interpretation of *Roderick v. St. Louis Southwestern Railway Co.*, 299 S.W.2d 422, 428, 429 (Mo. 1957), (Op. B. 13, 14), is strained. The Court said:

[As to a previous opinion of that Court] Nowhere in the opinion does the Court *say or even intimate that a sensitivity to chrome, acquired through negligence of an employer, such as will impair an employee's earning capacity, does not constitute an injury for which he may recover damages. The opinion holds directly to the contrary.* It further holds that the evidence shows the injury resulting in sensitivity is permanent but does not show that the dermatitis is necessarily permanent. Obviously, it was correct in so holding.

In the instant case, several things are made clear by plaintiff's evidence:

(1) At trial time, plaintiff was and had been for more than two years afflicted with a recurring dermatitis, which may or may not clear up if he stays completely away from chromates;

(2) He has developed a permanent sensitivity to chromates, which renders him permanently unfit for employment where he may come into contact with them;

(3) He has and for an indefinite time in the future will have a polysensitivity to such things as oils, greases, solvents, etc., thereby *impairing his ability to earn money for an indefinite period of time*; and

(4) There is no evidence that the polysensitivity is permanent.

We hold that there was evidence justifying the submission of an award of damages for *a distinctive permanent injury sustained by plaintiff*, to-wit: An acquired sensitivity to chromates that would cause a recurrence of dermatitis if he should come into contact with them, *thereby reducing or impairing his earning capacity pro tanto.* (Emphasis supplied)

* * *

In view of our conclusion that there was substantial evidence of permanent impairment of plaintiff's earning capacity, it follows as a matter of course that the trial court erred in refusing plaintiff's proffer of the mortality tables . . . (Emphasis supplied)

Id. at pages 428, 429.

Honeycutt v. Wabash Railroad Co., 313 S.W.2d 214, 216 (1958), is hardly applicable to Mr. Russell's case even though it, too, is referred to in the railroad's brief. (Op. B. 13). Mr. Russell had surgery and was left with a deformed, tilted, scarred, narrowed and arthritic lumbosacral joint in his back. He lost seventeen and half months work amounting to net after-tax earnings of $50,397.00. Mr. Russell returned to work in spite of his treating surgeon's reservations and opinion to the contrary. Mr. Russell was slower and did not "get around" as well on his job as he did before his injury and surgery. Conversely, in *Honeycutt*, Mr. Honeycutt "lost the balance of the day of his injury and two days for a trip to Decatur, Illinois, for a medical examination." It was pointed out in that opinion that the plaintiff's lawyer in *Honeycutt* offered no evidence of the plaintiff's earnings prior to his injury and offered no evidence of plaintiff's life expectancy so as to support a claim for future lost earning capacity.

The Alabama Supreme Court has not ignored decisions of the federal appellate courts, as stated in the railroad's accusative "Question Presented for Review." It followed the general law as to proof of earning capacity impairment as did the trial court:

> Although loss of future earning capacity does not necessarily follow from a permanent injury alone, here the partial loss of that capacity is fairly and *reasonably inferable* from the nature and extent of the injury and the type activities engaged in by plaintiff at his work. The evidence and circumstances here adduced at trial rendered the jury capable, if not just as capable as an expert, to correlate the injury with the lost earning capacity. See *Carnival Cruise Lines, Inc. v. Snoddy*, 457 So.2d 379 (Ala. 1984). (Emphasis supplied)

Opinion of Trial Judge, Page A-18, A-19, Railroad's Petition to this Court.

In addition, the trial court and Supreme Court of Alabama followed the mandate of *Bailey*, supra, p. 9, and *Rogers v.*

Missouri Pacific Railroad, 352 U.S. 500, 506-507, 77 S.Ct. 443, 448-449, 1 L.Ed.2d 493, 499, 500 (1957), that a jury determination has a special place in FELA cases:

> It [the jury's province] is *part and parcel of the remedy* afforded railroad workers under the Employers' Liability Act. (Emphasis supplied)
>
> * * *
>
> *To deprive these workers of the benefit of a jury trial in close and doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. Bailey v. Central Vermont Railroad*, 319 U.S. 350, 353, 354, 53 S.Ct. 1062, 87 L.Ed. 1444, 1447, 1448 (1942).

As stated by Mr. Justice Douglas in a scholarly concurring opinion in *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 93 L.Ed. 497, 509:

> The Federal Employers' Liability Act was designed to put on the railroad industry some of the costs for the legs, eyes, arms, and lives which it consumed in its operations.

It is for this reason that the act is to be construed liberally in favor of the employee. That is not to say that plaintiff in the case at bar needs any liberal construction.

CONCLUSION

Rarely will an appellate court include the plethora of medical proof of impaired earning capacity found in the Supreme Court of Alabama's opinion in the case at bar. In addition, that medical proof is applied to solid F.E.L.A. principles. Couple this with the fact that it deviates not at all with the law of *Parra, DeChico,* and other cases cited by the railroad.

Therefore, ALABAMA is not out of the mainstream of F.E.L.A. damage law but has and will continue to ROLL with the TIDE.

This Petition is inappropriate under the circumstances and should not be granted.

Respectfully submitted,

By: Frank O. Burge

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been served upon all parties required to be served: Hobart A. McWhorter, Jr., Esq., Joseph B. Mays, Jr., Esq., and John D. Watson, Esq., Bradley, Arant, Rose & White, 1400 Park Place Tower, Birmingham, Alabama 35203, by forwarding three (3) copies thereof through the United States mail, first-class postage prepaid and properly addressed, on this 4th day of January, 1990.

Frank O. Burge

FRANK O. BURGE, JR.